

NO. 20185

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RT HOOPES and RAE S.)
ES,)
)
Appellants,)
)
vs.)
)
N OIL COMPANY OF CALIFORNIA,)
orporation,)
)
Appellee.)
<hr/>	

BRIEF OF APPELLANTS

ARNOLD,
Lathrop Building,
2073,
orage, Alaska
rney for Appellants

FILED

AUG 2 1955

FRANK H. SCHMID, CLERK

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E: Throughout this Brief transcript references apply to Vol. 1 of the transcript unless otherwise indicated.]

JURISDICTION

By the first cause of action set forth in their Complaint (TR 1-18-119) Appellants seek threefold damages for violation of the Anti-Trust laws as the same are defined in Section 1 of the Clayton Act, Title 15, Sec. 12, USCA (TR 119) jurisdiction was vested in the District Court by Section 15 of the Clayton Act, Title 15, Section 15 USCA. The jurisdiction of the Court to review the Judgment below was granted by Title 28, Section 1291 USCA. The second and third causes of action set forth in the Complaint are not brought under review by this appeal. Section 1 of the Complaint was denied (TR. 119).

STATEMENT OF THE CASE

The controversy arises from transactions having to do with a service station for the distribution of gasoline and related products located at Fairbanks, Alaska, and owned by appellants Robert Hoopes and his wife, Rae S. Hoopes, and operated or leased by them to service station operators who, in agreement with Appellee, purchased their requirements exclusively from Appellee.

During the course of discovery proceedings Appellee objected (TR 126) to answering interrogatories respecting the existence or non-existence of agreements with its service station operators (TR 122-123) providing for rebates or discounts from posted prices to such operators who purchased their requirements exclusively from Appellee. The basis of objection was that the interrogatories involved alleged violation of the Robinson-Patman Act and appellants were not aggrieved or had no standing to sue for such violation. (TR 126-217). In aid of its objection, Appellee moved for partial summary judgment (TR 187) on the ground that Appellants lacked standing to sue and that Appellee could "not possibly" constitute a monopoly in violation of the Sherman Act (TR. 187), and further that the action was barred by the five-year Statute of Limitations. The trial court (TR 197) granted summary judgment on the ground that Appellants lacked standing to sue for the reason that they were not persons



ered in their business or property by reason of anything
bidden in the Anti-Trust laws. (TR. 197). No evidence was
en and the facts pertinent to the trial court's decision
the Motion for Summary Judgment are found in the plead-
s, exhibits, affidavits and interrogatories of record.

COMPLAINT

Appellants by their Complaint allege that Appellee
the largest or second largest factor in the sale, market-
and distribution of petroleum products in the Fairbanks
Metropolitan Area (TR. 3) and in Alaska as a whole (TR. 5)
that the Fairbanks Metropolitan Area, as a result of
ation and limited transportation is an economic and
petitive marketing region with respect to petroleum
ucts, separate and distinct from other parts of Alaska
4) and that Alaska itself is a similar separate and
inct region (TR. 5). These allegations are substantially
tted by paragraphs V, VI, VII and VIII of Appellee's
er to Amended Complaint (TR 133-134) and the allegations
substantiated by defendant's Exhibits A & B (TR 219-220)
ring gasoline sales in millions of gallons in Alaska
in the Fairbanks area, together with comparative sales
Standard Oil Company and Texaco (TR. 4 of Vol. III), its
competitors. It is further alleged (TR. 9-10) that
llee by a series of transactions herein generally des-
ed, and more specifically set forth in paragraphs 10, 11,



13, 14 and 15 of Appellants' Complaint (TR. 6-9),
into effect an over-all arrangement and plan which
considered together with the dominant marketing pos-
on of Appellee was intended to and did foreclose or
sibly foreclose competition in a substantial line of
merce throughout an area of competition, and constituted
exclusive requirements contract of long duration in
straint of trade and a monopolization or an attempt to
opolize trade and commerce and a discrimination in prices
ged and a contract or agreement for the sale of gasoline
ducts on condition that the purchaser should obtain all of
requirements from Appellee and not use or deal in the
odities of its competitors, all in violation of the
-Trust laws of the United States.

Appellants in paragraph 24 (TR. 14), 25 (TR. 15), 26
15), 27 (TR. 16) and 28 (TR. 17), allege that by reason
litigation commenced by Appellee in the State Court at Fair-
s more fully discussed supra and the claim of Appellee
right of possession of the service station, threats of
inued litigation and demands that Appellee's products be
d exclusively on the premises by lessees or purchasers, made
during and after litigation and continuing until the comm-
ment of this suit, Transfare, Inc., the service station oper-
became financially involved and vacated the service station
it was impossible, by reason of the acts of Appellee for

ellants to sell or lease the service station and that
e remained idle. Appellants allege (TR. 17) they were
aged by the wrongful or unlawful actions of Appellee in
lation of the anti-trust laws and are entitled to three-
d damages.

CASE IN THE STATE COURT

As previously set forth, Appellee brought action
inst Appellants and Transfare, Inc., the operator of the
vice station, to recover possession and for damages,
ing their suit on the alleged existence of a lease. The
igation was pending from October 27, 1958 until April 11,
2, during which time Transfare, Inc., vacated and the
mises remained vacant throughout that litigation and until
ree quieting title in Appellants was entered in this case
April 27, 1963. Judge Jay Rabinowitz, who heard the case
hout a jury in the State Court, found that no lease ex-
ed, but did find:

"A requirements contract which purported
to bind Hart *** to purchase Union gasoline
for sale on the subject premises" (TR. 79)

apparent purpose of which -

"Was to bind the owner operator to Union's
product, as well as to impose a sanction in
order to obtain an exclusive outlet for
Union's gasoline" (TR 79)

that -

"It is apparent that Union desired to tie up
the subject premises to maintain an exclusive
outlet for the sale of its gasoline (TR. 85-86)

* * *



"The consent clause is part and parcel of Union's objective of maintaining its exclusive outlet by continued binding of the owner-operator or the subject premises to a requirements contract. Since the date of the alleged breaches by defendants and the inception of this litigation to the date of trial, Union has received of defendants precisely the object of the overriding intent of Union throughout this transaction, and that is that since the alleged breaches to the date of trial, Union's, and only Union's, gasoline has been sold from defendants' premises." (TR. 87)

COLLATERAL ESTOPPEL

The above quotations are from the opinion of Judge Jay Knowlitz dated October 19, 1961, and incorporated by reference as a part of the Findings of Fact and Conclusions of Law in Civil Action 10,230 in the State Court at Fairbanks, titled "Union Oil Company of California, a corporation, Plaintiff, vs. Robert Hoopes and Rae S. Hoopes, defendants", insofar as the same are consistent with the Findings of Fact entered in said cause (TR. 26). There are no inconsistencies (TR. 26-39).

Judge Walter H. Hodge, by his pre-trial order of May 1963, in this case (TR. 114-115) held that under the doctrine of collateral estoppel the issues "of fact and law" determined in Civil Action 10,230 at Fairbanks and essential to the judgment in that case could not be relitigated here. On the trial of this case "are to the extent material, facts deemed and considered as exclusively established" between the litigants here. Appellee does not dispute the binding effect of the former proceedings (TR. 10, Vol. 3).



INTERROGATORIES

Answers to interrogatories propounded to Appellant
ert Hoopes substantiate the allegations of the Complaint
147).

Answers to interrogatories propounded to Appellee
sofar as they were answered at all, established the alleg-
ons of the Complaint as to Appellee's position as a major
ducer, refiner, of petroleum products in the Pacific Coast
a, a fact which can hardly be disputed. But as previously
tioned (page 2, supra) Appellee failed to answer interroga-
ories No. 11 (TR. 122), 12 and 13 (TR. 123) having to do
n rebates from posted prices given to service station
rators who purchased their requirements exclusively from
ellee. The amended interrogatories were served and filed
May of 1963 and objections to answering Nos. 11, 12 and
made by Appellee have completely dominated this case from
n until now (TR. 120).



SPECIFICATIONS OF ERROR

Trial Court erred -

(1) By that portion of its pre-trial order of May 1963 (TR. 14) denying Appellants' Motion for Summary judgment on the issue of liability;

(2) By its Memorandum to Counsel of October 15, 1963 (TR. 170) holding that Appellants, not being or having been competitive purchasers of the products of the Appellee, had no standing to sue for damages for violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (15 USCA Sec. 13), and that Appellee need not answer interrogatories seeking information respecting such violation;

(3) By its Memorandum to Counsel and Order of April 1965 (TR. 197) holding that appellants lacked standing to sue under Sections 1 and 2 of the Sherman Act (15 USCA Sec. 1 and 2) for the reason that not being operators of the service station which is the subject of this suit, but owners, lessors or contract vendors thereof, they are not persons injured in their business or property by reason of anything forbidden in the Anti-Trust Laws within the meaning of 15 USCA Sec. 15 and also lacked standing to sue under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 USCA Sec. 13).

(4) By its Order of April 27, 1965, directing Partial Summary Judgment upon Less than All Claims, entered herein on

April 27, 1965, holding that Appellants recover nothing against Appellee for violation of Sections 1 and 2 of the Sherman Act (15 USCA Sec. 1 and 2) or Section 2 of the Clayton Act (15 USCA Sec. 13) or any of the other Federal Anti-Trust laws, including Section 3 of the Clayton Act (15 USCA Sec. 14);

(5) By entertaining and granting Motion for Summary Judgment before discovery was completed and while a genuine issue as to material facts existed.

SUMMARY OF ARGUMENT

The Complaint states a cause of action for violation of the Anti-Trust laws. The answer, interrogatories and admissions, together with the Findings of Fact, Conclusions of Law and Judgment of the Alaska State Court at Fairbanks in an action between the same parties, and by which Appellee is bound under the doctrine of collateral estoppel, establish such a violation.

Appellee objected to answering interrogatories concerning secret rebates and kickbacks to its independent service station operators and contended that appellants, not being purchasers of Appellee's petroleum products, and lessors rather than operators of the service station, had no standing to sue.

The Trial Court granted summary judgment on that basis before discovery was complete. Violation of the Anti-Trust laws having been established, and Appellants having been persons injured in their business and property by such violation, summary judgment should have been entered for Appellants rather than Appellee. The case should be remanded.

NOTE: Sections of the Anti-Trust Laws referred to in this brief are Reproduced in full in the appendix).

ARGUMENT

THE PRESENT POSTURE OF THE CASE

It can hardly be contended that the Complaint does not state a violation by Appellee of Section 1 of the Sherman Act, Title 15, Sec. 1, USCA, denouncing contracts in restraint of trade and Section 2 of the Sherman Act, Title 15, Sec. 2, USCA, making it a crime to monopolize or attempt to monopolize any part of trade or commerce, and Section 3 of the Clayton Act, Title 15, Sec. 14, USCA making it unlawful to sell, contract to sell or lease commodities on condition, agreement or understanding that the lessee or purchaser shall not deal in the commodities of competitors when the effect may be to substantially lessen competition or tend to create monopoly in any line of commerce.

These are Anti-Trust laws and an action for three-fold damages is granted "to any person who shall be injured in his business or property by reason of anything forbidden by the Anti-Trust Laws" by Section 4 of the Clayton Act, Title 15, Sec. 15, USCA.

ANY PERSON INJURED

We come now to the decisive point in this appeal. Judge Plummer held by his Memorandum to Counsel and Order of April 8, 1965 (TR. 197-200) that Appellants lacked standing to

ue for violations of Section 1 and 2 of the Sherman Act,
title 15, USCA, Sections 1 and 2, and Section 2 of the Clayton
ct, as amended by the Robinson-Patman Act, Title 15 USCA,
ec. 13. He made no mention of Section 3 of the Clayton
ct, Title 15, Sec. 14 USCA, although he stated his belief
hat in so holding all Anti-Trust claims were disposed of
TR. 198). He specifically disclaimed any intention of
uling on the issue of monopoly (TR. 198).

THE ISSUE

The issue then is not whether Appellee has violated
he Anti-Trust Laws. A violation is well pleaded and as
aid in Simpson v. Union Oil Company of California (9th Cir.
963), 311 F. Rep. 2d 764, 765, and in the same case on
ppeal, Simpson v. Union Oil Company, 12 L. ed 2d 98 (Dec.
pr. 20, 1964) a violation will be assumed for the purpose
f the Motion for Summary Judgment.

STANDING TO SUE

Judge Plummer found at the urging of Appellee, that
ppellants were not injured by reason of the assumed violation
nd therefore have no standing to sue. Appellee's contentions
s evidenced by the record are -

(1) Appellants as Lessors have no standing to
ue (TR. 7, Vol. 3) and

(2) Appellants, not being or having been competitive
urchasers of the products of Appellee are not entitled to
ue for damages for alleged violation of the Robinson-Patman

Act. (Appellee's objections to answering interrogatories (TR. 126-127)).

(1) LESSORS

This Court pointed out in Simpson v. Union Oil Company (Appellee here) 311 F. 2d 764, 768 that a treble damage action is in tort and not affected by privity of contract or lack of it. The Supreme Court on appeal went further and held that there is actionable wrong whenever restraint of trade or monopolistic practice has an impact on the market -

"And it matters not that complainant may be only one merchant."

Harrison v. Paramount Pictures, 115 F. Supp. 312, Aff. 3rd Cir., 211 F. 2d 405, C.D. 348 U.S. 628, was relied upon by Appellee in the Court below and an effort was mde by Appellants to distinguish the decision of this court in Steiner v. Twentieth Century Fox Film Corporation (9th Cir. 1956) 232 F. 2d 190.

Application of the holding of this Court in Steiner, supra, must turn on the factual situation that existed in Steiner when the case was heard and decided as compared with the factual situation here on the present state of the record. Appellant Steiner was the owner there, as are Appellants here. The Hansens were the lessees of Appellant there as Transfare, Inc., here, between May 19, 1958 and April 30, 1961, although that status was denied by Appellants. The Hansens, as lessees there, were not parties to the litigation and Transfare, Inc.,

as the Lessee of Appellants during the period above mentioned is not a party to the litigation here; the case having been dismissed as to them. The Hansens were originally joined as defendants in Steiner, but the action was dismissed as to them before the appeal which resulted when the above decision was taken. This is clearly established on page 193 of the decision where the Court said:

"After remand Appellant dismissed her Complaint against the Hansens and re-appealed."

This Court in Steiner quickly distinguished the factual situation in the Harrison decision relied upon by Appellee, by saying on page 193:

"The Appellees assert that as a matter of law the Appellants interest as a landlord is too remote to permit recovery. The cases cited by the Appellees are not factually similar to the case at bar. In Harrison v. Paramount Pictures, D.C. E.D. Pa. 115 F. Supp. 312, Aff. 3rd Cir. 1954; 211 F. 2d 405, there was no direct dealings between the plaintiff and defendant. Here the Appellant asserts the Appellees conspired with the prime lessee to force Appellant to receive less than a reasonable rent."

While no conspiracy is alleged here, it is alleged that the contracts, agreements, arrangements, etc., as found by Judge Abinowitz to exist between Appellee and Hart and Transfare, Inc., his assignee, were in violation of the anti-trust laws and resulted in the financial failure of Transfare, Inc., and the closure of the service station, with a direct injury to appellants in the form of lost rentals and depreciated property value. Further direct injury to Appellants was inflicted by the action of Appellee in instituting proceedings to

repossess the service station under the terms of the unlawful exclusive requirements contract.

Again on page 194 of Steiner, supra, the Court said:

"However, the Complaint asserts the Appellees in concert with Hansen forced the Appellees to do the acts detrimental to her reversionary interest, such as granting to the Hansens in 1938 more favorable lease terms than could have been obtained in a free competitive market, and gave options to renew without adequate consideration. This is sufficient to state an anti-trust claim by a landlord."

The facts alleged here go far beyond those asserted in Steiner. Appellants not only lost the rental from the property by reason of the acts of Appellee, but Appellee thereafter, by harassing litigation, threats, letters, etc., prevented appellants from finding a new tenant and caused the value of the property to deteriorate (Para. 24 of the Complaint, TR. 4, 15). It was only the judgment of the trial court quieting title in Hoopes, entered April 17, 1963, (TR. 114) that enabled appellants to offer the property for rental or sale without threat of reprisal from Appellee. The impact of Appellee's wrongful action was directly on Appellants. The recovery sought is for damages suffered directly by Appellants and not through Hart or Transfare, Inc.

TEST APPLIED BY STEINER

The test applied by Steiner is not whether the plaintiff joined the Lessee as a party defendant, or whether the Lessee is a participant as distinguished from a victim. The question to be determined is whether the wrongful acts directly

injured the plaintiff. It is the test of remoteness. The landlord cannot recover for injury to his tenant alone, but only when he himself is injured. The wrongful acts of Appellee were directed at Appellants and resulted in injury to them, commencing in April of 1961, when their rental income was cut off. Further acts of Appellee caused the value of their property to deteriorate.

The allegations of the Complaint, Answer, Memorandum Opinion, Findings of Fact and Conclusions of Law, Pre-Trial Orders, Affidavits, Answers to Interrogatories and Exhibits which constitute the present record in this case cover four distinct periods -

First Period: Between December 1st, 1955, when Appellants sold to Hart and May 19, 1958, when Hart and Transfare quitclaimed to Appellants. Appellants were the Vendor and Hart the Vendee with Transfare, Inc., as his Assignee. There was no suggestion of a lessor-lessee relationship, and no injury was suffered by Appellants.

Second Period: Second, between May 19, 1958, and July 11, 1958. During this period of about 52 days, Transfare, Inc., was in peaceful and undisturbed possession and no injury was suffered by Appellants. Hoopes considered themselves lessors but Appellee did not.

Third Period: Third, between July 11, 1958, when Appellee gave notice to Appellants (TR. 60) that Appellee claimed to be lessor of the premises to Transfare, Inc., and

that Transfare, Inc., was delinquent "in payment of his rents to us" and that if the default was not remedied in fifteen days Appellee "will take over the operation of the premises", and the surrender of the premises by Transfare, Inc., on April 30, 1961 (TR. 59). During this entire period Appellee was denying the relationship of landlord and tenant between Appellants and Transfare, Inc., and seeking to regain possession of the premises from Appellants and Transfare, Inc., pursuant to the lease and lease-back agreements with Hart. On October 27, 1958, Appellee, in furtherance of its position above stated, commenced the Fairbanks action seeking possession and a money judgment.

Judge Rabinowitz found, as stated supra, that no relationship of landlord and tenant or lessor and lessee existed among any of the parties during any time prior to the conclusion of the trial on July 12, 1961. He found a "requirements contract divorced from any landlord-tenant implications" (TR. 17-A)

Fourth Period: Fourth, between the conclusion of the trial before Judge Rabinowitz on July 12, 1961, and April 17, 1963, when Judgment quieting title in Appellee was entered in this case (Tr. 1.4) During this period Mr. Merdes, attorney for Appellee, threatened that Appellee would enjoin any efforts by Appellants to lease the station (TR. 152) and in October, 1962, Scott and Merdes, attorneys for Appellee wrote threatening letters (TR. 49, 50). Officers and agents of Appellee informed

prospective lessees and their agents that Appellants had no authority to lease the premises (TR. 152 - containing answer of Appellant Hoopes to Appellee's interrogatory No. 32, TR. 145) . No suggestion of a Lessor-Lessee relationship. Only an effort to prevent one.

INJURY

The first injury suffered directly by Appellants was in April 1961, when Transfare, Inc., vacated the premises under pressure from Appellee. As a result, Appellants suffered a loss of rental income. This occurred during the third period above mentioned. Further damage was suffered by Appellants by reason of the continued acts and actions of Appellee throughout the remainder of the third period and all of the fourth period. The relationship of landlord and tenant did not and could not exist between Appellee and Transfare, Inc., after April 1961. Appellants were in possession. The actions of Appellee injured Appellants directly.

Furthermore, the contention of Appellee was that at all times after December 1st, 1955, Appellee was the Lessee of Appellants, pursuant to the lease and lease-back with Hart, and that Hart and Transfare, Inc., held under Appellee and not under appellants. If this contention was true, then Appellants as the landlords have joined Appellee, the lessee, as a defendant in this action and has alleged a cause of action and resultant damage directly against Appellee as such lessee. However, Judge Rabinowitz did not agree with

Appellee. He found an exclusive requirements contract and not a lease.

WRONGFUL ACTS

The wrongful acts of Appellee from which Appellants suffered direct damage were -

(a) Surrender and vacation of the premises in April 1961 as a result of the suit filed October 27, 1958 pursuant to its Notice of July 11, 1958, and other pressures by Appellee (TR. 58);

(b) The threat of Mr. Merdes, attorney for Appellee to obtain an injunction against Appellants in the event Appellants endeavored to lease the premises to someone other than Appellants (TR. 152);

(c) The actions of officers and agents of Appellee after the judgment in the Fairbanks case became final on June 12, 1962, in informing prospective lessees and their agents that Appellants had no authority to lease the premises (TR. 15, 16, 152);

(d) Letters of Scott and Merdes, attorneys for Appellee (TR. 49, 50);

(e) The resulting cloud on Title (TR. 57).

Under the test applied by Steiner, the injury is indirect and not remote. This is especially true since the

actual injury and damage suffered by Appellants was after April of 1961, while Appellants were in possession and looking for a tenant or purchaser.

THE HARRISON CASE

The Harrison decision (Harrison v. Paramount Pictures, 115 F. Supp. 312, aff. 3rd Cir. 211 F. 2d 405, c.d. 348 U.S. 828) relied upon by Appellee specifically distinguishes itself from the case at bar as follows:

"This is not a case in which by reason of the unlawful acts of the defendant a tenant has been forced to default in his rent. That situation need not be considered here."

The District Court decision in Harrison was affirmed in a per curiam opinion by the Third Circuit and apparently is still the law in that circuit in factual situations to which it applies. However, the Third Circuit has not been overly vigorous in its support. Chief Justice Biggs of the Third Circuit was openly critical of the Harrison decision in his dissent in Melrose Realty Company v. Lowe's Inc., 234 F. 2d 518, and advocated reconsideration of the rule laid down in Harrison. He distinguished Harrison from Steiner and approved the holding in Steiner. He agrees that the question is one of "remoteness", and cites the decision of Judge Learned Hand of the Second Circuit in Vines v. General Outdoor Advertising Co., 171 F. 2d 87 where Judge Hand pointed out on page 491 that the anti-trust laws give a right of action to "any person who shall be injured in his business or property by reason of anything forbidden in

the anti-trust laws", and that such action accrues to those
o injured "though they have no contract with the wrongdoer
ut only an expectation of future dealing with him. * * *
he absence of any contract obligation gave the defendant no
ore immunity from that tort than from any other tort." This
ecision by Judge Learned Hand was previously cited with approv-
l by this Court, in Karseal Corporation v. Richfield Oil Corp-
ration (9th Cir.) 221 F. 2d 358, 363 where it is said:

"The treble damage action is one for a tort and
punitive and compensatory damages is the relief
granted. 'Under the Clayton Act the right is not
confined to persons in privity with the wrongdoer,
but is given to anyone who has suffered injury to
his business or property by reason of the wrongful
acts.' Clark Oil Co. v. Phillips Petroleum Co.,
supra, 148 F. 2d at pages 582-583. Vines v. General
Outdoor Advertising Co., 2nd Cir., 1948, 171 F. 2d
487, 491."

The Court in Harrison went on to say that if an injury
ould be traced to the acts of the defendant, the "question
f remoteness remains" and "it is not possible to formulate
ny general rule by which to determine what injuries are too
emote to bring a plaintiff within the scope of the Act and I
all not attempt to do so. Each case must be dealt with on
s own facts."

In other words, the Court bottomed its decision in
Harrison on remoteness of the injury and not on the legal
relationship between plaintiff and defendant or whether or not
e lessee if there was a lessee, was a violator or a victim.

Harrison, received rough treatment by the 7th Circuit

Congress Building Corporation v. Lowe's Inc., (7th Cir. 1957) 246 F. 2d 587. The Seventh Circuit, after dissecting the Opinion and the reasoning upon which it was based, said on page 595:

"We therefor decline to follow the rule laid down by the Third Circuit in Harrison and Melrose decisions."

The Seventh Circuit pointed out on page 589 of its decision in Congress, this Court had distinguished Harrison in its decision in the Steiner case.

The decision in Congress analyzes the cases in which Harrison has been followed. None of those mentioned involved the Lessor-Lessee or Landlord-Tenant relationship, but concerned patent holders, insurance brokers and suppliers.

Furthermore, as Congress points out on page 592 the Supreme Court of the United States in 1957, after the Harrison decision and others like it restricting the remedies of private litigants under the anti-trust laws, admonished the Federal Courts that they should not:

"Add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws [Anti-Trust] Radovich v. National Football League, 352 U.S. 445, 453, 454, 77 S. Ct. 390, 395, 1 L. ed. 2d 456, 462.

Radovich is quoted in the same vein in Simpson v. Union Oil Co. (Dec. Apr. 20, 1965) 12 L. ed. 2d 98, 102.

Productive Inventions, Inc., vs. Trico Products Corp., (7th Cir. 1955) 224 F. 2d 678, has been urged but like Harrison it did not involve the landlord-tenant lessee-lessor



relationship, but that of a patent holder and his licensee. The licensee was injured by the Anti-Trust violation. The Court held the injury to the patent holder to be indirect and too remote. The Court, however, said:

"No hard and fast rule can be laid down in those situations as the line between direct and incidental damage is not always definable with clarity. All we have determined is that under the facts pleaded appellant has no right to recover treble damage."

NALLY

Appellee is estopped from asserting a landlord-tenant lessor-lessee relationship between Appellants and Hart and his Assignee, Transfare, Inc., or Appellee itself. Judge Rabinowitz found that the documents and transactions between the parties were not leases, but an exclusive requirements contract extracted from Hart by Appellee at the time Hart was a contract purchaser of the service station property. That finding is not open to question here. Furthermore, when the decision by Judge Rabinowitz was announced, Appellee immediately abandoned any pretense of lessor-lessee relationship and claimed on the basis of that decision to be holder of an exclusive requirements contract binding Appellants to dispense only Appellee's products from the premises until 1960 (TR. 4, 50)

COMPETITIVE PURCHASERS

The contention that Appellants, not being purchasers from Appellee have no standing to sue for damages suffered as a result of the price discrimination pleaded in violation of

Sec. 2(a) of the Clayton Act as amended by the Robinson-Patman Act, Title 15 USCA Sec. 13(a). This was the trial court's ruling (TR. 197-198). It also assumed that the ruling bars all actions for violation of the anti-trust laws. This was the contention of Appellee below.

It is submitted that even if the right to maintain treble damage actions for violation of Section 2(a) of the Clayton Act was limited to purchasers from the violator, still the limitation would not apply to actions for violation of other anti-trust laws. But the entire premise is wrong. The status of purchaser is not a prerequisite to suit for violation of Section 2(a) of the Clayton Act, Title 15, Sec. 13(a) USCA.

AUTHORITIES CITED BELOW

Two cases were cited below in support of Appellee's position. The principal one being Klein v. Lionel Corporation (3rd Cir. 1956) 237 F. 2d 13, 15. It must be admitted that the decision appears to support Appellee's contention. The court may have attempted to announce such a rule, but it did not attempt to apply it in the case under decision. It not only found that the plaintiff Klein was not a purchaser, but also found that he failed to show that there had been two purchasers from defendant, one of whom was discriminated against within the meaning of the Act. This is apparent from the careful reading of the decision and that of the trial court where the case originated (See Klein v. Lionel, D.C. Dela. 1956,

138 F. Supp. 560) and of the authorities cited by the Circuit Court in support of its holding.

The entire language of the Circuit Court in the Klein opinion pertinent to the question of standing to sue is found on page 14 and 15 and reads as follows:

"[1,2] The decisions of many cases have crystallized the rule that an individual can have no cause of action under Section 2(a) of the Clayton Act unless he is an actual purchaser from the person charged with the discrimination. In Shaw's Inc., v. Wilson-Jones Co., 3rd Cir. 1939, 105 F. 2d 331, 333, we stated: 'The discrimination in price referred to must be practiced between different purchasers'. Therefore, at least two purchases must have taken place. The term purchasers means simply one who purchases, a buyer, a vendee. Klein did purchase Lionel products, but not from Lionel. It follows that the necessary requisite of two purchasers from the same vendor is not met and Klein therefore can claim no protection under the Act as a direct purchaser."

The case fell because there was no showing of "two purchasers from the same vendor" and not because plaintiff was not a purchaser from defendant.

Any other construction makes the decision contrary to the authorities cited by the Judge who wrote it as will be demonstrated later. Furthermore, and just as important, the case has never been cited in support of the proposition that standing to sue for violation of Section 2(a) of the Clayton Act, Title 15, Sec. 13(a) USCA, is dependent upon plaintiff being one of the direct purchasers.

All of the cases cited in Klein, supra, except FTC v. Morton Salt Co. (1948) 334 U.S. 37, 45, 68 S. Ct. 822; 92 L. ed. 1196, lay down the same rule. That rule is that there

must be two purchasers from the same seller in order to support an action for treble damages under Title 15, Section 13(a) USCA. Not a single case holds that only an actual purchaser has standing to sue. In the Morton Salt Co., supra, case, the Supreme Court held that FTC "need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors. FTC was the plaintiff and nothing was said about standing to sue in a treble damage action.

SECOND CASE CITED IN SUPPORT

The decision in Schwartz & Sons, Inc., v. Sunkist Growers, Inc., (D.C. Mich. 1962) 203 F. Supp. 92, the second authority cited below by Appellee treats with a different set of facts and a different subsection of the Clayton Act than is involved here. As the Court stated on page 95 of the decision, Plaintiff based its action exclusively on sub-section (e) of Section 13, Title 15, USCA, which prohibits discrimination:

"In favor of one purchaser against another purchaser" "furnishing services or facilities not accorded to all purchasers. The Court on page 99 of the decision said:

"We conclude that the alleged violators of 15 USCA, Section 13(e) are not within the purview of said statute. The prohibition contained in the statute is therein stated to be discrimination 'in favor of one purchaser against another purchaser of a commodity bought for resale ***. *** How can plaintiffs rely upon the matter of discrimination for their cause of action without preliminarily establishing that they are purchasers? *** Chief Judge Biggs stated unequivocally that one must be a direct purchaser to be entitled to protection under the Act (Title 15 USCA Sec. 13(e) *** We conclude

"that plaintiffs are not purchasers within the meaning of 15 USCA Section 13(e)."

Section 13(e) of Title 15 prohibits the furnishing of advertising matter, showcases, display material, free delivery, etc., to one purchaser of products bought for resale and not to another. The violation is "to discriminate in favor of one purchaser against another purchaser". No such language is found in Section 13(a), and no such facts are present here.

The reference to Chief Judge Biggs is to the language in Klein, supra. The Michigan District Court apparently thought the language in Klein referred only to Section 13(e) or at least that it was correct only with respect to that subdivision.

OTHER DECISIONS

The same is true of every other decision cited either in Klein or in which Klein is cited as support. Appellants cannot find where any other Court has stated or applied a rule limiting treble damage recoveries under Sec. 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 USCA Sec. 13(a) to cases where the plaintiff purchased from defendant. Several have placed that limitation on actions founded on Sec. 13(e) of Title 15.

SUPREME COURT AND OTHER CIRCUITS

In any event the rule which Appellee contends was announced by the Third Circuit in Klein supra, has not been approved by the Supreme Court and has never been followed in

any other Circuit.

SECOND CIRCUIT

The Second Circuit is not in agreement with the contention of Appellee. There the rule announced in Midland Oil v. Sinclair, infra, has been cited with approval. In Package Closure Corporation v. Sealright Company (2nd Cir. 1944) 141 F. 2d 972, 980, Circuit Judge Frank, speaking with respect to standing to sue under the price discrimination provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 USCA, Sec. 13(a) said:

"It is not necessary that plaintiff show that it was a purchaser against whom defendant discriminated." (Citing Midland Oil v. Sinclair, infra)

Since Judge Frank disagreed in part with the other two judges, it might be contended that the above quotation represents the minority view. We do not think so. Judge Frank spoke for the entire Court. There is nothing which indicates the others were in disagreement on this point.

SIXTH CIRCUIT

In Ludwig v. American Greeting Corporation (6th Cir. 1959) 264 F. 2d 286, 289, the Sixth Circuit Court in reversing the trial court said:

"[5] The opinion of the District Judge indicates that the principal reason for his ruling was because this action was on behalf of a competitor of the Appellant rather than by a customer claiming discrimination between himself and another customer.

*** The Act has been construed as giving a right of action to a competitor who is injured in his business as well as to a customer who has been discriminated against. Moore v. Mead's Fine Bread Co., 348 US 115, 118, 75 S. Ct. 148, 99 L. ed. 145; Mandeville Island

"Farms, Inc., v American Crystal Sugar Co., 334 U.S. 2 19, 236, 68 S. Ct. 996; 92 L. ed. 1328; Central Ice Cream Co., v. Golden Rod Ice Cream Co., 7 Cir. 257 F. 2d 417, 418; Kentucky Tennessee Light & Power Co. v. Nashville Coal Co., D.C. W.D. Ky., 37 F. Supp. 728, 735; Aff. Fitch v. Kentucky Tennessee Light & Power Co., etc., 6 Cir. 136 F. 2d 12, 149 A.L.R. 650, Streiffer v. Seafarers Sea Chest Corp., D.C., E.D. La., 162 F. Supp. 602, 607."

SEVENTH CIRCUIT

No Circuit Court decision has been found in the Seventh Circuit touching on the question of standing to sue. But a District Court of that Circuit has passed directly on the question. Midland Oil Company v. Sinclair Refining Company, (D.C. Ill. 1941) 41 F. Supp. 436, was an action for treble damages sustained by plaintiff, a gasoline distributor, by sales of gasoline at discriminatory prices by Sinclair Oil company to two of its own customers, neither of which was plaintiff. The Court said on page 438:

"Section 15 of Title 15 of the United States Code Annotated provides that 'Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue' etc. Section 13(a) of Title 15 USCA (being one of the anti-trust laws referred to in Section 15) provides that "It shall be unlawfull *** to discriminate in price between different purchasers of commodities of like grade and quality. ***"

"The plaintiff's second amended complaint recites that the defendant has discriminated between certain of its customers and that as a result of that discrimination by the defendant between its customers, the plaintiff engaged in a similar line of business to that operated by the defendant was injured in his business and property. Thus it will be seen that the plaintiff sets up a cause of action substantially in the language of the Statute. ***"

"Section 15 gives the right to an individual to

"sue for damage that he has sustained whether or not the public interest is affected thereby. Nor is it necessary for the party injured to be operating a business in interstate commerce or to have been a purchaser discriminated against by the defendant. The requirements of the Act are met if the defendant is engaged in interstate commerce and has discriminated between some of its purchasers and the plaintiff damaged thereby."

This is the case cited with approval by the Second Circuit in Package Closure Corporation v. Sealright Company, supra,

Finally we come to consideration of the rule in this circuit. We submit that the decision of this Circuit Court in Karseal Corporation v. Richfield Oil Corporation (9th Cir. 1955) 221 F. 2d 358, is conclusive on the point.

It is true that the precise section of the statute involved here was not relied on in Karseal, supra. The action here was for violation of Section 3 of the Clayton Act (15 USCA 14) and not Section 2. Nevertheless, the Court said on page 363:

"Under the Clayton Act the right is not confined to persons in privity with the wrongdoer, but is given to anyone who has suffered injury in his business or property by reason of the wrongful acts."

Again on page 364 the Court in rejecting the argument of Richfield there (and Appellee here) that plaintiff distributor (there) and Appellants' lessee (here) might have a cause of action, but their principal would not, said:

"But it would appear that both the manufacturer and the independent distributor have such a cause of action."

Again on page 365 and on the same subject, the Court said:

"An interpretation which would read into the statute an unjustifiable restriction as to persons authorized to bring the action, might call for invalidation of the statute. The language of the statute does not warrant such a restrictive interpretation. The Congress in the Clayton Act, stated in Section 4, 'Any person who shall be injured *** may sue ***'" (emphasis supplied by the Court)

This court pointed out on page 365 that the right of action for treble damages was part of the over-all plans of the Clayton Act and the -

"Right of the injured party to recover damages was intended to promote a greater respect for the Act."

and that -

"The treble damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute."

Other statements to the same effect are found in the decision.

In Steiner v. Twentieth Century Fox Film Corporation

9th Cir. 1956) 232 F. 2d 190, the action was for treble damages based on violation of Sections 1 and 2 of the Sherman Act. It was asserted by defendant on appeal that plaintiff, as landlord, could not recover for loss of income from and value of his theatre property by reason of monopolistic acts of defendant and lessee. This Court held that the landlord had standing to sue, even though privity was lacking.

SUPREME COURT

Appellee's argument for a rule narrowly restricting the right to sue receives no support from the Supreme Court. Two relatively recent far-reaching, hard-fought decisions involved

treble damage actions for price discrimination by plaintiffs who were not purchasers from defendant. In both cases the Court held without hesitation that the action was well founded. The precise question of plaintiff's standing to sue was not commented upon directly by the Court. However, standing to sue existed in the cases or they could not have been maintained.

In Moore v. Mead's Fine Bread Company (1954) 348 U.S. 15, 75 S. Ct. 148, 99 L. ed 145, the Court in referring to the act of defendant in cutting bread prices to its distributors in one area, but not in another (price discrimination) thereby damaging plaintiff who produced his own bread and was not a purchaser from the defendant, said:

"This type of price-cutting was held to be 'foreign to any legitimate commercial competition even prior to the Robinson-Patman Act."

The action for treble damages was sustained.

In Safeway Stores v. Vance (1957) 355 U.S. 389, 78 S. Ct. 358, 2 L. ed 2d 350, the action was for selling at unreasonably low prices and price discrimination and was pleaded under Section 3 of the Robinson-Patman Act. The Court on the basis of its decision in Nashville Milk Company v. Carnation Company (1958) 355 U.S. 373, 78 S. Ct. 352, 2 L. ed 2d 340, dismissed the action insofar as it rested on alleged unlawful selling at low prices in violation of Section 3 of the Robinson-Patman Act, but held that plaintiff was entitled to a trial on the charge of unlawful price discrim-

summary judgment for Appellants and should do so. Other Circuits have so acted under similar circumstances. International Longshoremen's Association v. Seatrain Lines, Inc., (2nd Cir. 1964) 326 F. 916; Proctor & Gamble Ind. Union v. Proctor and Gamble Manufacturing Co. (2nd Cir. 1962) 312 F. 2d 181, 190.

The Supreme Court took similar action under similar circumstances in Simpson v. Union Oil, 12 L. ed 2d 98, where summary judgment had been granted Union Oil Company below. The Court found that the record established a violation of the Anti-Trust laws and a right of action in Simpson. As the Court said on page 106 of the decision:

"Hence on the issue of resale price maintenance under the Sherman Act there is nothing left to be tried."

The case was remanded for assessment of damages. The question then is whether or not the Findings of Fact and Conclusions of Law and Judgment in Civil Action 10,230 together with other acts and admission of Appellee show a violation of the anti-trust laws. We submit that they do.

Important and perhaps decisive on this question is the recent decision of the Supreme Court in Simpson vs. Union supra, where Appellee here was found in violation there on a record much less persuasive than this one. The violation was price maintenance. Here it is a series of actions, agreements, threats and coercion whereby Appellee attempted to and did monopolize a part of trade and commerce.

SECTIONS 1 and 2 OF THE SHERMAN ACT

Actions and agreements perhaps different in form, but so similar in substance and effect as not to be distinguished were denounced by Judge Yankwitz in the Standard and Richfield cases, as violative of the Sherman Act and the decisions were affirmed by the Supreme Court in U.S. vs. Standard Oil Company (S.D. Calif. 1948) 78 F. Supp. 850, Aff. Standard Oil Company of California v. U.S. (1949) 337 U.S. 293, U.S. Vs. Richfield Oil Corporation (S.D. Calif. 1951) 99 F. Supp. 280 Aff. Richfield Oil Corporation v. U.S. (1952) 343 U.S. 922.

In the recent decision of this Court in Lessig v. Tide-water Oil Company (9th Cir. 1964) 327 F. 2d 459, the Court said on page 474 of its decision -

"We rejected the premise that probability of actual monopoly is an essential element of proof or attempt to monopolize."

"When the charge is attempt (or conspiracy) to monopolize rather than monopoly, the relevant market is 'not an issue'"

Judge Rabinowitz found that "the overriding intent of Appellee was to see that Appellee, and only Appellee's gasoline was sold on the premises (TR. 24). He went further and held that Appellee was successful in its efforts. (TR. 24).

But this was not all. Appellee intended and attempted to oust the operators of the service station and take over its operation to further insure that only Appellee's products could be sold there (TR. 60). Through its attorney it attempted

to impose the requirement that only Appellee's products be dispensed on the premises (TR. 49, 50) for 8 or more years after trial.

We talk here of something more than just an agreement not to purchase the commodities of a competitor in violation of Section 3 of the Clayton Act. Appellee from 1958 to 1963, a period of five years, made a concerted and successful effort to insure to themselves a monopoly in the distribution of petroleum products at the service station which was one of the six (TR. 134), through which Appellee distributed approximately 25% of the petroleum requirements of the area. Appellee has successfully concealed what happened at the other five stations. They boldly and publicly asserted the right to continue for the balance of the fourteen year contract.

SECTION 3 OF THE CLAYTON ACT

In Standard Oil, supra, Judge Frankfurter, after describing the exclusive dealing contracts put into effect by Standard said on page 298 of 337 U.S. -

"Obviously the contracts here at issue would be proscribed if Section 3 stopped short of the qualifying clause ***"

Justice Frankfurter had reference to Section 3 of the Clayton Act and the qualifying clause, which reads -

"Where the effect of such lease, sale or contract for sale, or such conditions, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Applied here the holding in Standard, supra, reduces the question of a violation of Section 3 of the Clayton Act, to whether or not the actions of Appellee "may be to substantially lessen competition or tend to create a monopoly in any line of commerce". In the Standard, Richfield and Simpson v. Union Oil cases there was proof of many offending contracts or agreements. Here there is but one. This is necessarily so because Appellee successfully resisted answers to interrogatories respecting the existence of others. There is an additional one that can be judicially noticed. That is the arrangement found to exist and commented upon by Judge Folta in City of Ketchikan v. Lot 5, etc., (Alaska 1954) 126 F. Supp. 461, 15 Alaska 287, wherein the Court said -

"It appears to be a well established policy of the Company [Union Oil] to obtain exclusive outlets for the sale of its products."

LESSIG V. TIDEWATER OIL COMPANY

In Lessig, supra, this Court on page 473 said -

"The Clayton Act's prohibition of agreements which tend to create a monopoly" is violated though the tendency is a creeping one rather than one at full gallop; nor does the law await at the goal before condemning the direction of the movement."

SECTION 2(a) OF THE CLAYTON ACT - APPELLEE'S DILEMA

Unlike the other violations pleaded, there is no proof in the present record of price discrimination in violation of Section 2(a) of the Clayton Act, Title 15, Sec. 13(a).

The proof is of restraint and imposition of an exclusive requirements contract of long duration. There can be no proof of price discrimination or lack of it until Appellee answers the interrogatories. These answers must inevitably show that Appellee granted secret rebates to all of its independent outlets or only to some of them. If a kickback was given to some and not all, a price discrimination results. If it was given to all under circumstances similar to the arrangement with Hart and Transfare, Inc., the restraint and impact on competition is further aggravated. It is for this reason that Appellees fought hard and successfully in the lower court to conceal their activities.

SUMMARY

"Defendant's counsel was pursuing the customary practice in anti-trust cases of segmenting the case into parts as small and precise as possible and then attempting to demonstrate there was nothing of merit in each particular part or segment."

The above language was used by this Court in Simpson v. Union Oil Company of California (9th Cir. 1963) 311 FR 2d 764-767. It applies equally to this case.

Appellee, always protesting innocence, raised one obstacle after another to the answering of the interrogatories. Being confronted with a violation alleged by Appellants and established by the Findings in the Fairbanks case, Appellee retreated to the position that Appellants lacked standing to sue.

This is the only question in the case and it is without merit. There is some authority in the Third Circuit for the

proposition that the status of purchaser is a pre-requisite to the right to maintain a treble damage action for violation of Section 2(e) of the Clayton Act, Title 15, Sec. 13(e) USCA. By loose language the holding was applied in actions for violation of Sections 2(a) of the Clayton Act as amended by the Robinson-Patman Act, Title 15, Section 13(a) USCA. The rule is not persuasive and is definitely not the law of this Circuit. The action here is for violation of all of the anti-trust laws with particular emphasis on Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Appellee also contends that Appellants were lessors and as such lack standing to sue for violation of Section 3 of the Clayton Act. This contention is also without merit.

There is no authority anywhere for the proposition that plaintiffs must be purchasers and that lessors are disqualified to maintain actions for violations of Sections 1 and 2 of the Sherman Act. But Appellee is not without a position here. It asserts, without authority, that the alleged but non-existent disqualification to sue for violation of the Clayton Act operates in some way not disclosed to disqualify appellants from maintaining any action under the anti-trust laws where the facts alleged show a violation of both the Sherman Act and the Clayton Act. The contention falls of its own weight.

THE AMERICAN CAN COMPANY CASE

This inquiry would not be complete without considering

87 F. Supp. 18. By his decision there Judge Harris held -

(1) The five years exclusive requirements contract placed in effect by American Can Company was not violative of Section 3 of the Clayton Act (page 32).

(2) Exclusive requirements contracts are not per se in violation of Sections 1 and 2 of the Sherman Act, but a five years exclusive requirements contract when examined in the light of its possible effect upon trade and commerce creates an unreasonable restraint in violation of Sections 1 and 2 of the Sherman Act (page 32)"

(3) A similar contract for one year would not be unreasonable and would permit competitive influence to operate at the expiration of the period, thus removing the vice of the five-years contract. The user consumer would be guaranteed and assured supply and protected by the obligation on the part of the supplier to meet his total needs for the limited one-year period.

In other words, exclusive requirements contracts are not necessarily in violation of Section 3 of the Clayton Act and if reasonable in duration are not in violation of the Sherman Act. But such a contract with a term of five years creates an unreasonable restraint because of its possible effect on trade and commerce.

What is the result of the application of that rule here? The contract was of fourteen years duration. The Appellee by its actions as found by Judge Rabinowitz fully enforced in every day of its existence until the conclusion of the trial at Fairbanks and thereafter until stopped by the Decree in the District Court in this case quieting title in Appellants. Appellee exercised complete restraint on the service station operators and they were compelled to and did

dispense only Appellee's products.

It will be argued that the market restrained was small - only a single outlet. Size of the market controlled and the extent of the competition restrained is not the test, rather it is the extent of the control and restraint. The control and restraint here were 100%. It was not only probable, but real.

A similar argument was made and rejected in United States v. National City Lines (7th Cir. 1951) 186 F. 2d 562, 567 where it was contended that since only a single user in each of several cities was induced to enter into the restraining contract that the Sherman Act was not violated. The Court said on page 567 -

"The Anti-Trust laws forbid practices through which competition or competitors are shut out of the market by provisions that limits it [a product] not in terms of quantity, but in terms of a particular venture."

In Union Carbide and Carbon Corporation v. Nisely (10th Cir. 1962) 300 F. 2d 561, 565 the Circuit Court said -

"But Sec. 1 of the Sherman Act condemns unreasonable restraints, irrespective of the amount of trade or commerce involved; and Section 2 condemns monopoly or attempt to monopolize either in concert or individually - any part of the trade or commerce."

THE STATUTE OF LIMITATIONS

Appellee argued below that the action is barred by the four-years statute of limitations, Title 15, Sec. 15(b) USCA. Judge Hodge disposed of this contention by his

pre-trial order of May 17, 1963, where he said that the issue as to violation of the Anti-Trust laws was -

"To be determined in this case subject to the four year statute of limitations as set forth in Title 15, Sec. 15(b) USCA which shall be considered controlling as to the accrual of the cause of action herein, but shall be considered to commence to run from the time of each successive injury to the plaintiffs ***"

He would hardly have held otherwise in view of the decisions of this court in Foster & Kleiser v. Special Site Sign Company (9th Cir. 1936); 85 F. 2d 742, 750 and Sukow Borax Mines Consolidated, Ltd., v. Borax Consolidated, Ltd., (9th Cir. 1950) 185 F. 2d 196-208, wherein the rule is laid down that a cause of action for treble damages arises when the damage is realized and the plaintiff's interest invaded. That occurred in this case April 30, 1961, when Transfare, Inc., was forced by unlawful actions of Appellee to vacate the service station to the damage of Appellants. See also Crummer Company v. Dupont (5th Cir. 1955) 223 F. 2d 238, 247 and the very recent case of Highland Supply Corporation v. Reynond Metals Company, 327 F. 2d 725.

CONCLUSION

The case should be remanded.

Respectfully submitted this 28th day of July, 1965.

W C Arnold
W.C. ARNOLD, Attorney for Appellants

CERTIFICATE OF COUNSEL

I Certify that in connection with the preparation of this Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

W C Arnold
W.C. ARNOLD, Attorney for Appellants

APPENDIX

EXHIBITS

Identified, offered
and received

A - Taxable Gallonage - Alaska (TR. 219)	TR 4, Vol. III
B - Taxable Sale (TR. 220)	TR. 4, Vol. III

Section 1 of Sherman Act, Title 15 USCA, Sec. 1

"§1. Trust, etc., in restraint of trade illegal;
exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: PROVIDED, That nothing contained in Sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory or the District of Columbia in which such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: PROVIDED FURTHER, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court. July 2, 1890, c. 647 § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282."

Section 2(a) of the Clayton Act as amended by the
Robinson-Patman Act, Title 15 USCA, Sec. 2(a)

"Discrimination in price, services, or facilities -
Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them, PROVIDED, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such sold or delivered ***"

Section 2(e) of the Clayton Act as Amended by the Robinson-
Patman Act, Title 15 USCA, Sec. 2(e)

"Furnishing services or facilities for processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Section 2 of Sherman Act, Title 15, USCA, Sec. 2

"§2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize or attempt to monopolize, or combine or conspire with other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court. July 2, 1890, c. 647, §2, 26 Stat. 209; July 7, 1955, C.281, 69 Stat. 282

Section 3 of Clayton Act, Title 15 USCA, Sec. 14

"§14. Sale, etc. on agreement not to use goods of

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3. 38 Stat. 731.

Section 4 of the Clayton Act, Title 15 USCA, Sec. 15.

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, §4, 38 Stat. 731.

